Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

CARL A. MAAS, ET AL.,

Petitioners,

vs.

TEXAS AIR CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITION FOR WRIT OF CERTIORARI

THOMAS W. REAVLEY
Counsel of Record

1301 West 25th Street
Suite 535
Austin, Texas 78705
(512) 476-2464

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether a parent corporation's obligations under a contract guaranteeing its subsidiary's performance of a collective bargaining agreement are excused by the subsidiary's rejection of that agreement in the course of the subsidiary's bankruptcy?

LIST OF PARTIES

PETITIONERS:

Carl A. Maas, Jr.
Norman W. Adair
Robert D. Adams
John A. Adamski
J. Frank Anderson, Jr.
Chester L. Arnow
A. A. Arthur
David L. Baker
Sammy D. Balch
A. Newton Ball
James D. Bateman
Aubrey J. Battley
Jim H. Bausch
W. Thomas Baxter
Warren R. Beckman
Donald R. Bennett
Ronald E. Bennett
Peter R. Biberacher
Edward W. Birdwell
Robert C. Blainey
J. C. Blauvelt, III
Ronald A. Bloecher
Johnny H. Boardman
Herb R. Boyer
Robert J. Brooke
James E. Brown, Jr.
Richard E. Byrant
Michael J. Burke
Robert G. Burnett
William R. Bynum
Harold E. Cameron
Joseph A. Cangilose
Richard P. Capp
Floyd E. Carpenter
Glenn L. Chonoski
Jann T. Christian
James G. Conger, Jr.
A. Charles Cook
Edward A. Cox
T. B. Crawford
Charles W. Croll
Robert C. Curtis
Philbrook S. Cushing
Joel N. Daniel
Joe C. David, Jr.
Joseph R. Dark
Tommie G. Dees
Pete B. Dennis
James C. Dixon
Paul R. Downing
Arthur L. Dozier
Foster E. Dudgeon
Anthony E. Eggers
Amrand Eknayan
William R. Elliott
Bobby J. Ellis
Jay W. Ellis
Richard F. Engle
James J. Erdos
Roger D. Erickson
Alexander Evans, III
Joe M. Faulkner
Donald J. Faull
Martin J. Fedigan

LIST OF PARTIES – Continued

Harry Bryson Feild
Gary W. Ferguson
Homer W. Feuchter
Michael T. Finnegan
Douglas B. Fletcher
Bill L. Floyd
Robert A. Foley
Gary F. Forister
Jon I. Fox
James H. Gamble
Gerald E. Garner
John B. Gartner
C. E. Gillespie
Robert T. Gilmartin, Jr.
Walter A. Green
Dale R. Haas
Kenneth P. Haas
J. T. Haire
Levon Hambarzumian
Steven C. Hane
Harry G. Hansen
R. J. Hardin
James S. Harmon
Garn G. Harris
James R. Hartman
Larry L. Hartmen
Richard L. Harvey
O. C. Haworth
Rupert L. Hayes
Albert T. Helmick
Jack H. Henderickson
Charles E. Henry
Marden A. Hiett
Rogert E. Hines
Wm. J. Hopper
Sanford S. Howard
John E. Howell
Roy L. Huff
R. L. Hughes
Henry K. Jaeger
Suley Jarvits
Ronald Jennings
John Jensen
Donald G. Johns
James K. Johnson
Leslie N. Johnson
Peter A. Johnson
Karen M. Kahn
Allen L. Kelley
Thomas Kelley-Lusk
James R. Keltner
Fred W. Kenyon
Christopher R. Kern
James C. Ketner
L. D. Killough
H. R. Koch
John H. Koontz
Arthur J. Krum
John D. Labarre
Philip T. Landry
Gary P. Laplante
Ronald F. Lary
Harold E. Lawson
Robert E. Letson
Clarence W. Levingston, Jr.
Howard S. Loitwood, Jr.
James L. Losey
Lynn A. Lowe,

LIST OF PARTIES – Continued

J. D. Lowry
Lidle L. Lykins
Doug B. Mabry
Richard P. Mahoney
T. E. Martin
Kenneth J. Masat
Jon R. McBride
Jerry D. McNiece
Douglas B. Merz
Thomas R. Meyers
Denney E. Miller
John D. Milligan
James G. Milliman
Eric R. Moerman
David R. Monroe
Claude J. Montes
Larry G. Moore
Norman P. Morgan
Leon M. Morris
Frank E. Muckle
Rolfe L. Munson
John W. Murray
John C. Murray
Wayne C. Nash
Baxter L. Oakes
Jay L. Oliverio
Joseph E. O'Neill
Philip M. Orday
Robert A. O'Rorke
James H. Parkes
Jack E. Pendleton
T. A. Piroli
Gary W. Portizline
V. Curtis Powell
John H. Prater
Robert E. Pries
Harold Provo
R. P. Quinn
Garland R. Reece
Thomas R. Reed
Max L. Reinig
Eugene Rene Robert
Harold S. Roberts
William A. Ros
T. W. Rowan
Arthur Rubens
Erwin K. Ruggles
Nich H. Ruysenaars, Jr.
Stanley S. Rynear
Fidel N. Sanchez
Joseph Sari
Robert E. Schaefer
J. V. Sclifo
Charles B. Scott
Larry L. Severson
Michael J. Shadwick
Charles A. Schaheen, Jr.
Larry A. Sheehan
Paul L. Shelton
Robert W. Shelton
Donald R. Sinclair
William M. Sines
Kenneth E. Smith
Larry R. Smith
Neil R. Smith
Richard Smith
Richard E. Smith
Richard M. Smith
Thomas L. Smith
Arthur J. Sparks

LIST OF PARTIES – Continued

Ned P. Stark
William M. Steele
James D. Steinmetz
J. E. Stockstill
Jerry B. Street
Willaim G. Stromblad
Harvey L. Strong
Donald W. Taylor
Harvey L. Thompson
Stanley C. Titcomb
Gary N. Tjossem
William T. Todd
Duane E. Tuttle
Richard M. Ulmer
Harold C. Vanis
George C. Vermef, Jr.
Charles R. Walker
Richard N. Walton
Maxwell R. Ward
Edward R. Warnock
Ronald R. Waters
Dennis J. Welkle
Robert G. Wensel
Clifford A. White
Neil L. Whittlesey
Elmer I. Wiesman
John David Williams
Gary A. Wilson
George Wolf
David V. Wood
Evan E. Wood
Carroll E. Wooten
Robert L. Young
Glenn W. Diefenderfer
Christopher D. Zwingle
Norman Sykes
Sidney P. Alexander
Theodore A. Alen
Jerry L. Becker
Paul Britton
Ridgely P. Brown
Robert L. Cady
Stanley E. Campbell
John K. Duncan
John K. Forsythe
John P. Frederick
Donald A. Henderson
Charles X. Hernett
Raymond O. Houchen
Craig S. Jacobsen
John M. Kretsinger
Ronald G. Kurtz
Raymond L. Lueke
George G. Lycan
William D. Maytun
Richard E. Mason
Carl J. Minkner
Vincent A. Monforte, Jr.
Billy R. Moody
Eddie J. Nash
William A. Olson
Frank Oster
James H. Payne, Jr.
Harry T. Pearce
Charles D. Rice
Hugh E. Scott
Frederick H. Secord
Jackson C. Taylor
Kenneth W. Tiegs

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Charles E. Turk
James L. Waters

RESPONDENT:

Texas Air Corporation,
now known as Continental Airlines
Holdings, Inc.

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OPINIONS BELOW

This petition seeks review of the unpublished judgment and opinion of the Court of Appeals for the First District of Texas, which affirmed the judgment of the 80th District Court of Harris County, Texas. Petitioners sought damages on a contract claim against respondent, and the state court of appeals affirmed summary judgment for respondent based on its interpretation of 11 U.S.C. §365(a) (permitting the debtor to reject executory contracts in bankruptcy proceedings). The Supreme Court of Texas denied petitioner's application for writ of error,

which sought discretionary review of the decision of the Court of Appeals.

JURISDICTION

This court has jurisdiction to review the opinion and judgment of the Texas court of appeals pursuant to 28 U.S.C. §1257. The opinion and judgment of the court of appeals were issued on March 14, 1991. The court of appeals overruled petitioners' motion for rehearing on April 25, 1991. Petitioners filed their application for writ of error with the Supreme Court of Texas on May 24, 1991. On June 8, 1992, the Delaware bankruptcy court handling Texas Air Corporation's Chapter 11 bankruptcy proceedings granted petitioners limited relief from the automatic stay: Petitioners were allowed to go forward with the case in the Texas Supreme Court and "the appropriate lower appellate court, on remand, if applicable". The Supreme Court of Texas denied the application for writ of error on November 4, 1992, and it overruled petitioners' motion for rehearing on December 9, 1992. The prior modification of the bankruptcy automatic stay did not permit petitioners to seek review in this Court; petitioners had to file a request for further modification of the stay. On March 26, 1993, the bankruptcy court granted a further modification of the automatic stay to permit this application for writ of certiorari. The existence of the automatic bankruptcy stay extended the time for filing this petition until April 25, 1993, or 30 days after termination of the automatic stay. 11 U.S.C. §108(c). This petition is filed within the 30 day period and is therefore timely.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. §365(a) states:

> Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C. §365(g) provides:

> Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease. . . .

STATEMENT OF THE CASE

This is a breach of contract case in which the Court of Appeals sustained a defense based on its interpretation of federal bankruptcy law.

In 1982 the Air Line Pilot Association, International ("ALPA") entered into a modification of its collective bargaining agreement (the "Basic Agreement") with Continental Airlines, Inc. ("CAL" or "Continental"). In essence, the pilots conceded over $100 million in wage and benefits rights in exchange for job security assurances: CAL agreed that "[a]ll present or future flying performed in and for the service of Continental [was] to be performed by pilots on the current Continental Pilot Seniority List."

However, ensuring performance of the Basic Agreement was a critical issue, and the Continental pilots were not satisfied that the CAL contract would adequately

protect them. Therefore, at the same time the 1982 agreement with CAL was executed, the pilots sought and obtained, acting through ALPA, an agreement from Texas Air Corporation ("TAC"), CAL's parent, adding TAC's own promise that CAL would perform (the "Side Letter"). This agreement with TAC provided:

> 3. TAC agrees that neither it nor any organization in which it or its successors or affiliates owns a controlling interest or exercises operational control shall conduct FAR Part 121 commercial flight operations unless such flying shall be performed by pilots on the CAL and TI System Seniority Lists. . . . App. 22.

The Side Letter was to "run concurrently with the Duration section of the CAL Basic Agreement, as modified" (para. 6) and also provided for arbitration of disputes that might arise under its terms. App. 22-23. The "Duration section" of the CAL Basic Agreement stated that the agreement " . . . shall continue in full force and effect until *September 30, 1984.*"

In September, 1983 CAL filed for bankruptcy under Chapter 11 (11 U.S.C. §1101). CAL began implementing new work rules inconsistent with the Basic Agreement immediately following its bankruptcy filing. (The bankruptcy court approved CAL's rejection of the Basic Agreement in June, 1984, but effective September 1983). The pilots, acting through ALPA, went on strike, and CAL responded by hiring non-Seniority List pilots, in violation of both the Basic Agreement and the TAC Side Letter. ALPA requested arbitration of the Side Letter in December 1983, but TAC refused.

In January, 1984, TAC filed a federal suit against ALPA seeking a declaration that it did not have to arbitrate the Side Letter claim. In August, 1985, while this suit was pending, CAL withdrew voluntary recognition of ALPA as the pilots' collective bargaining representative. Faced with these actions by CAL and TAC, petitioners, approximately 280 of the 1700 striking pilots, filed this suit in Texas state court based on TAC's breach of the Side Letter. Petitioners sought damages to compensate them for lost wages and benefits resulting from TAC's breach.

The state trial court granted TAC's motion for summary judgment on the merits and the state court of appeals affirmed. The court of appeals held that the bankruptcy rejection of the Basic Agreement caused termination of the Side Letter and also stated that petitioners' claims were barred by the Side Letter's arbitration clause:

> The summary judgment question of liability on this claim is answered by that provision that "any claim must be brought by arbitration." As a matter of law, this suit cannot be an available remedy for these third party beneficiaries, or for their agent for that matter.
>
> The summary judgment is correct because the "side letter" agreement has expired. "This Letter of Agreement shall run concurrently with the Duration section of the [Continental] Basic Agreement, as modified," says the side letter. The [Continental-ALPA] contracts cancellation by the bankruptcy court brought an end to the "side letter" rights of all concerned. By its own terms, it no longer is of any force or effect, and no recovery is available under it.

> . . . The contract has terminated, and had it not, the only recovery would be by *arbitration*. App. 7.

REASONS FOR GRANTING THE WRIT

I. THIS CASE IS IMPORTANT TO THE ENFORCEMENT OF NATIONAL LABOR POLICY.

When an employer seeks to reject a collective bargaining agreement in the course of bankruptcy proceedings, the policies behind national labor laws and the bankruptcy statutes come into direct conflict. This Court has previously emphasized the need to accommodate both policies as much as possible: It has held that the standard for bankruptcy court rejection of a collective bargaining agreement is higher than the normal "business judgment" standard. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

In this case the employees, through their union, had previously obtained an important protection beyond the collective bargaining agreement: a contract with the employer's parent corporation obligating the parent to have the employer subsidiary (and all other subsidiaries in which it owned a controlling interest) operate under the terms of the existing collective bargaining agreement. When Continental filed for bankruptcy protection and rejected its labor contract, its pilots had a significant contract damage claim against the (at the time) non-bankrupt parent. Yet the state court below dismissed this claim on the basis of federal bankruptcy law without any statutory or policy justification.

The importance of avoiding further unwarranted restrictions on the employees' ability to even the playing field in anticipation of a subsidiary employer bankruptcy justifies review by this Court.

II. THE STATE COURT HOLDING THAT BANKRUPTCY REJECTION OF THE CAL BASIC AGREEMENT CANCELS THAT CONTRACT IS CONTRARY TO 11 U.S.C. §365(a) AND ITS CONSISTENT INTERPRETATION BY FEDERAL COURTS.

One key benefit of the 1982 Basic Agreement to the Continental pilots was job security. Because of Continental's prior history, its pilots also demanded and received TAC's separate promise that neither Continental nor any other TAC subsidiary would violate the pilot seniority or other provisions of the Basic Agreement. TAC guaranteed Continental's performance of the Basic Agreement by delivering its own separate promise that Continental would perform.

The state court held that Continental's rejection of the Basic Agreement in bankruptcy "canceled" and "terminated" that contract and thereby relieved TAC from its Side Letter obligations because the Side Letter was to run concurrently with the Basic Agreement. This holding conflicts with federal law regarding the effect of an executory contract's rejection in bankruptcy proceedings. After a thorough review of the historical and theoretical underpinnings of contract rejection under 11 U.S.C. §365(a), one bankruptcy court recently held:

> Rejection's effect is to . . . [give the nondebtor party a claim for money damages]. Rejection has absolutely no effect upon the contract's continued existence; the contract is not canceled, repudiated, rescinded, or in any other fashion terminated.

In re Drexel Burnham Lambert Group, Inc., 138 B.R. 687, 708 (Bkrtcy.S.D.N.Y. 1992) (quoting Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U.Colo.L.Rev. 1, 16 (1991)). *Accord, Texaco, Inc. v. Louisiana Land & Exploration Co.*, 136 B.R. 658, 663 (M.D.La. 1992).

The state court holding also ignores the modern functional approach to contract rejection issues in bankruptcy proceedings. The federal policies underlying the debtor's option to reject executory contracts are to benefit the bankruptcy estate and to avoid unfairness or preference among creditors. *In re Drexel Burnham Lambert Group, Inc., supra*, at 707-709. These policies do not include benefitting a nonbankrupt parent corporation by relieving it from its separate obligation to ensure or guarantee that the debtor will honor its labor contract or to respond in damages for a breach of that obligation. Even the bankrupt party is subject to a bankruptcy damage claim for the injury to the nondebtor party caused by the contract rejection. *Intern. Broth. of Teamsters v. IML Freight, Inc.*, 789 F.2d 1460 (10th Cir. 1986); *see NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). The state court's holding turns bankruptcy law on its head by giving TAC, the nonbankrupt parent, more protection than Continental itself received by virtue of its own bankruptcy.

III. THE STATE COURT'S RELIANCE ON THE SIDE LETTER'S ARBITRATION CLAUSE AS A BASIS FOR JUDGMENT AGAINST PETITIONERS ON THE MERITS IS PLAINLY WRONG AND DOES NOT CONSTITUTE AN ADEQUATE STATE GROUND FOR ITS DECISION.

At no time in this case has TAC ever asked for enforcement of the arbitration provision in the Side Letter. Although courts favor arbitration agreements, the right to arbitrate can be waived if a party proceeds with a court action without ever requesting an order to arbitrate. *E.C. Ernst, Inc. v. Manhattan Const. Co. of Texas*, 551 F.2d 1026, 1039-40 (5th Cir. 1977), rehearing denied in part, granted in part, 559 F.2d 268, cert. den. 434 U.S. 1067; *Spain v. Houston Oilers, Inc.*, 593 S.W.2d 746 (Tex. Civ. App. – Houston [14th Dist.] 1979, no writ). TAC waived any arbitration rights by its decision to participate in this suit without raising the issue.

However, if the state court meant its conclusion regarding arbitration to be an alternate holding (as opposed to dicta), it committed an even more basic error. The remedy for disregarding an enforceable arbitration provision is to order the parties to arbitrate and stay or abate the suit pending the outcome of that arbitration. TEX. REV. CIV. STAT. ANN. art. 226, §§A, F; 9 U.S.C. §§3, 4. The decision below does just the opposite: By affirming a final judgment in favor of TAC, the court has conclusively barred any further proceedings, including arbitration.

The only way to make sense of the state court's handling of the arbitration issue is to construe this discussion as dictum rather than an alternate holding. Since

the court concluded that the TAC Side Letter was no longer in effect, it had no reason to order arbitration. However, if, as petitioners believe, the court erred in its interpretation of federal bankruptcy law, the decision cannot stand on the Alice in Wonderland reasoning that petitioners should lose their case because they must arbitrate it.

IV. THERE ARE NO OTHER GROUNDS SUFFICIENT TO JUSTIFY THE STATE COURT DECISION.

Although the state court of appeals based its decision solely on the effect of contract rejection under 11 U.S.C. §365 and the Side Letter's arbitration provision, respondent has argued other grounds to support their judgment in the courts below.

A. Petitioners Were Entitled to Sue on the Side Letter as Third Party Beneficiaries under State Law.

The Side Letter is an agreement between TAC and ALPA. ALPA was petitioners' union at the time the Side Letter was signed and therefore legally obligated to represent petitioners. Petitioners and other Continental pilots were the only possible beneficiaries of this contract; ALPA had no plausible interest in the agreement apart from the Continental pilots it represented. Petitioners are entitled to sue on the Side Letter as third party creditor beneficiaries because it was signed by ALPA exclusively for the pilots' benefit. Texas law does not require that petitioners be named in the contract in order for them to

bring suit. *Dairyland County Mutual Insurance Co. v. Childress*, 650 S.W.2d 770 (Tex. 1983); *Rudolph v. ABC Pest Control, Inc.*, 763 S.W.2d 930, 933-34 (Tex. App. – San Antonio 1989, writ den.)

TAC has argued below that the terms of the Side Letter only permit enforcement by ALPA. Paragraph 5 certainly permits ALPA to initiate enforcement (" . . . the Association may file a claim with TAC" App. 22), but no language states that only ALPA may enforce the agreement. In the absence of an explicit limitation on the rights of the pilot beneficiaries to enforce the agreement, Texas law permits them to do so. Members of labor unions and other unincorporated associations are entitled to enforce contracts made by the union or association for their benefit. *See Lone Star Cotton Mills v. Thomas*, 227 S.W.2d 300, 306 (Tex. Civ. App. – El Paso 1979, writ ref'd n.r.e.); *Ackermann v. Ackermann Schuetzen Verein*, 60 S.W. 366, 367-68 (Tex. Civ. App. 1900, no writ)

B. Petitioners' Claims Were not Waived in the Court-Approved Settlement of the CAL Strike.

The bankruptcy court handling Continental's bankruptcy approved a settlement of the pilot's strike in October 1985, after petitioners had filed this state court suit for damages under the TAC Side Letter. The bankruptcy court entered an Order and Award which gave the striking pilots three options. Pilots could (1) retain the right to be recalled in seniority order and waive all claims, (2) receive severance pay and waive all claims, or (3) retain their claims against Continental and TAC, with no severance pay or right to be recalled in seniority order. This

third option, elected by many of the petitioners, is summarized in a notice letter incorporated into the Order and Award:

> Each striking pilot retains the option of declining to waive his claims in the claims resolution process established by the Order and Award. As set forth at Sec. III.B.3 "Individual Claims" (p. 21) of the Order and Award, *such a pilot will retain all of his bankruptcy claims, and any other claims against Continental, its employees and affiliates;* but ALPA is not permitted to provide any support or assistance, direct or indirect, in the prosecution of such claims; any power of attorney previously granted to Cohen, Weiss & Simon is revoked. (Emphasis added.)

At the same time, the Order and Award provided that ALPA and TAC would dismiss their suit over the Side Letter and that ALPA would waive claims arising under the Side Letter. TAC argued below that ALPA's waiver of its claims under the Side Letter precludes petitioners from asserting any claims under that agreement.

The essence of the settlement was individual pilot choice. Rather than trying to impose a single resolution for all the Continental pilots, ALPA and Continental proposed a strike settlement that allowed the pilots either to keep their damage claims against Continental and TAC, or trade those claims for preferential recall or severance benefits. Petitioners had state court suits against TAC on the Side Letter pending at the time the settlement was made and approved by the bankruptcy court. In this context it is unreasonable to expand ALPA's waiver of rights against TAC to include waiver of all pilots' beneficiary rights under the Side Letter. The only viable claim petitioners got under Option 3 (since Continental was in

bankruptcy) was preservation of their claims as beneficiaries of the Side Letter against TAC. To say that this single benefit was simultaneously conferred and withdrawn would make Option 3 under the court-approved settlement a deceptive trap for pilots who relied on the language that they would retain their claims against Continental's affiliates. A more reasonable interpretation is that ALPA waived only its right to pursue the Side Letter claim in its own name and with its own participation, *but that petitioners who chose Option 3 retained the right to continue their third party beneficiary claims that had already been asserted in this state court suit.*

TAC has previously cited *O'Neill v. Texas Air Corporation*, No. 89-2455, 1990 U.S. App. LEXIS 6297 (5th Cir. April 13, 1990) (unpublished), in support of its waiver argument. In *O'Neill* the Fifth Circuit held that ALPA had the exclusive right to enforce the TAC side letter and that the O'Neill pilots' claims under the Side Letter were not preserved by the court-approved settlement. This decision is both mistaken and also distinguishable in part. The Side Letter does not state that it may be enforced only by ALPA or that the pilot beneficiaries have no enforcement rights. Petitioners' right to enforce the Side Letter is governed by Texas third party beneficiary law, and Texas law recognizes that members of unions or other unincorporated associations may enforce agreements made for the members' benefit.

The *O'Neill* case is also distinguishable because the Fifth Circuit determined that the O'Neill group of pilots had not asserted or threatened any claims under the Side Letter as of October 31, 1985, the date of the settlement. The court relied on this fact in concluding that the settlement did not preserve claims of the O'Neill group under

the Side Letter and that those pilots were estopped to deny ALPA's authority to settle the O'Neill group's claims. *However, petitioners filed this suit for damages against TAC under the Side Letter on September 23, 1985 – prior to the ALPA settlement.*

C. Petitioners' Damage Claims Against TAC Are Not Barred by Their Participation in the Strike Against CAL.

TAC argued below that petitioners have no damage claims because they chose not to work for Continental after it breached and repudiated the collective bargaining agreement, citing *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), and various NLRB cases. All of these cases involve the NLRB's general policy of not awarding back pay against an employer for the periods his employees were on strike. These cases do not apply to petitioners' state law contract claims against TAC *(which has consistently denied that it was petitioners' employer or a carrier subject to the Railway Labor Act).*

Petitioners' claims may be subject to the general contract defense of failure to mitigate damages. *See Lone Star Steel Co. v. Wahl,* 636 S.W.2d 217 (Tex. App. – Texarkana 1982, no writ). However, that defense was never considered by the court below. Mitigation relates to the amount of damages rather than liability. TAC's breach of the Side Letter excused further performance by petitioners. Their decision not to continue working for Continental at a fraction of their contract wage might or might not impact the amount of their damages, but it is immaterial to TAC's liability and to the decision below.

CONCLUSION

For the foregoing reasons, Petitioners pray that this Honorable Court grant this Petition for Writ of Certiorari and, upon review, reverse the decision of the state court of appeals and remand this case to said court for further proceedings consistent with the decision of this Court.

Respectfully submitted,

THOMAS W. REAVLEY
Counsel of Record

1301 West 25th Street
Suite 535
Austin, Texas 78705
(512) 476-2464

Counsel for Petitioners

APPENDIX A

Judgment Affirmed and Opinion filed March 14, 1991

(seal)

In The
Court of Appeals
For The
First District of Texas

NO. 01-90-00189-CV

CARL A. MAAS, et al, Appellants

V.

TEXAS AIR CORPORATION, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 85-53556

OPINION

Appellants, 280 current and former Continental Airlines, Inc. pilots ("the pilots"), appeal from a final take-nothing summary judgment in favor of appellee, Texas Air Corporation ("Texas Air"), the parent corporation of Continental Air Lines ("Continental"). We affirm.

In 1982, Continental and the pilots' agent, the Air Line Pilots' Association ("ALPA"), modified their 1979 collective bargaining agreement. In exchange for wage and benefit concessions, the pilots received job guarantees including, among other things:

1. All present or future flying performed in and for the service of Continental to be performed by pilots on the current Continental Pilot Seniority List.

2. This Agreement is binding upon any successors who shall employ the pilots on the Continental Pilot Seniority List regardless of the nature of the transfer of control, including bankruptcy.

ALPA wanted Texas Air to be a party to the Continental-ALPA modification. Because Texas Air was not an air carrier under the Railway Labor Act, and was not the employer of either Continental's pilots or ALPA members, Texas Air could not be a party to the modification. As a result, on the same date the modification was signed, ALPA and Texas Air signed a "side letter" in which Texas Air agreed "to provide reassurances that it is aware of and will abide by the Agreement made by Continental with the ALPA. In the "side letter," the parties agreed, among other things:

1. Texas Air acknowledged it was aware of the written agreement between Continental and the Pilots Association and agreed to abide by that agreement.

2. Flying to be performed by the pilots on the Continental Seniority Lists in accordance with the terms and conditions of the Continental-Pilots Association Basic Agreement.

3. In the event a dispute arises concerning this Agreement, the Pilots Association may file a claim with Texas Air. In the event the matter is not satisfactorily resolved, any claim is to be settled by arbitration.

One year later, in September 1983, Continental filed a petition under chapter 11 of the Bankruptcy Code, ceased domestic operations, implemented emergency work rules, which included unilateral changes in pay, benefits and conditions, and filed a motion to reject its collective bargaining agreement with the ALPA, which the bankruptcy court granted.

In response to Continental's bankruptcy, and the implementation of the emergency work rules, ALPA and its pilots began a strike against Continental. Continental then began using non-seniority list pilots for commercial flight operations.

Pursuant to paragraph five of the "side letter," the pilots sent a letter to Texas Air claiming violation of the "side letter" and demanded arbitration. Texas Air filed suit in the United States District Court for the Southern District of Texas seeking a declaration that ALPA's demand to invoke arbitration was null and void. ALPA counterclaimed, demanding arbitration. There is conflicting evidence concerning wither the court granted ALPA's request. In August 1985, Continental withdrew recognition of ALPA as the pilots' bargaining representative.

On September 23, 1985, the pilots brought this suit against Texas Air to recover damages for breach of the "side letter" agreement.

On October 31, 1985, after this lawsuit between the pilots and Texas Air was filed, ALPA and Continental settled the strike by way of an "Order and Award," which defined the rights of striking pilots to future employment by Continental. The Order and Award provided for one of three options to be selected by each pilot and any pilot

not selecting an option would automatically be relegated to option 3. Option 1 permitted pilots to return to work in seniority order and contained a waiver of all claims against Continental and its affiliates. Option 2 permitted pilots to resign and collect substantial severance benefits and also contained a waiver of all claims against Continental and its affiliates. Option 3 permitted pilots to return to work not in seniority order, at the end of the seniority list. The pilots selecting this option were not required to waive their claims against Continental and its affiliates. According to the pilots, the Order and Award did not purport to settle this litigation between the pilots and Texas Air.

Texas Air, in its first amended original answer to the pilots' original petition, asserted 12 affirmative defenses: lack of jurisdiction; res judicata; collateral estoppel; the agreement is null and void; the agreement provides no right to damages; the claim is barred by the statute of limitations; accord and satisfaction; discharge in bankruptcy; waiver; pilots received payment; release; no agreement with individual pilots; and pilots have no standing. The latter two defenses were not verified as required by TEX. R. CIV. P. 93(1)(2).

On August 26, 1988, pursuant to TEX. R. CIV. P. 166a, the pilots moved for summary judgment on the issue of liability and requested, pursuant to TEX. R. CIV. P. 166a(d), a separate trial on the issue of damages. The pilots claim their summary judgment evidence, affidavits and exhibits, show that a valid agreement between Texas Air and ALPA was entered into on August 18, 1982, Texas Air breached that agreement, and the pilots incurred actual damages.

On October 31, 1989, pursuant to Tex. R. Civ. P. 166a(b), Texas Air moved for summary judgment, setting forth the following grounds: the pilots' claims are barred by ALPA's agreement to settle and waive all claims under the "side letter;" the pilots may not recover any damages under the "side letter;" the "side letter" terminated as of the date of Continental's bankruptcy filing.

On January 10, 1990, the trial court granted Texas Air's motion for summary judgment and denied all the pilots' claims.

When both parties move for summary judgment, each party must carry his own burden as movant. *James v. Hitchcock Indep. School Dist.*, 742 S.W.2d 701, 703 (Tex. App. – Houston [1st Dist.] 1987, writ denied). In addition, the court may consider all the summary judgment evidence in deciding whether to grant either motion. *Dallas County Appraisal Dist. v. Institute for Aerobics Research*, 766 S.W.2d 318, 319 (Tex. App. – Dallas 1989, writ denied). The court can rely on one party's evidence to supply missing proof in the other party's motion. *Seaman v. Seaman*, 686 S.W.2d 206, 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e). But, the court must indulge all reasonable inferences and resolve all doubts in favor of the losing party. *University of Texas v. Big Train Carpet*, 739 S.W.2d 792 (Tex. 1987). Under rule 166a of the Texas Rules of Civil Procedure, summary judgment may be rendered only if the pleadings, depositions, admissions and affidavits show (1) that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

As the plaintiff/movant, the pilots had the burden to show they were entitled to prevail on each element of their cause of action as a matter of law. Texas Air, as defendant/movant, had the burden to establish as a matter of law that there was no genuine issue of fact as to one or more of the essential elements of the pilots' cause of action. *Dallas County Appraisal Dist.*, 766 S.W.2d at 320. A fact issue is presented when conflicting inferences may be drawn from uncontroverted summary judgment proof. *Id.*

The side letter is the basis of this suit and its terms are controlling of it. The parties to it are ALPA and Texas Air; they are the designated, named parties, and the expressed benefits and obligations are assigned to them in written terms. In fact, and by federal statue, ALPA was the representative of the Continental pilots in negotiating the "side letter." The pilots in this suit seek recovery as third-party beneficiaries.

Terms of the side letter mandate affirmance of the granting of the Texas Air motion for summary judgment. By its terms it has expired, and under it only arbitration is a remedy.

This suit seeks to recover damages for breach of the "side letter." Paragraph 5 of the Letter of Agreement reads as follows:

> In the event a dispute arises concerning this agreement, the Association may file a claim with [Texas Air]. [Texas Air] shall answer the claim in writing within 10 days following receipt of the claim. In the event the matter is not satisfactorily resolved, *any controversy or claim arising out of or relating to this agreement* shall be settled

> by arbitration in accordance with the United States Arbitration Act. 9 U.S.C. Section 1.

(Emphasis added.)

The summary judgment question of liability on this claim is answered by that provision that "any claim must be brought by arbitration." As a matter of law, this suit cannot be an available remedy for these third party beneficiaries, or for their agent for that matter.

The summary judgment is correct because the "side letter" agreement has expired. "This Letter of Agreement shall run concurrently with the Duration section of the [Continental] Basic Agreement, as modified," says the side letter. The [Continental-ALPA] contracts cancellation by the bankruptcy court brought an end to the "side letter" rights of all concerned. By its own terms, it no longer is of any force or effect, and no recovery is available under it.

We need not look to third party rights or individual rights of those who have "withdrawn" from ALPA, because recovery is not possible by the very terms of the contract on which suit is brought. The contract has terminated, and had it not, the only recovery would be by arbitration.

The judgment of the trial court is affirmed.

/s/ Justice (Ret.) Stephen F. Preslar[1]

Former Appellate Justice Price[2] also sitting.

Chief Justice Evans not participating.
Do not publish. TEX. R. CIV. App. P. 90

Judgment rendered and opinion delivered Mar. 14, 1991

True Copy Attest:

/s/ Kathryn Cox
Kathryn Cox
Clerk of Court

---

[1] Hon. Stephen F. Preslar, Chief Justice Retired, Eighth District of Texas at El Paso, sitting by assignment.

[2] Hon. Frank C. Price, justice, former appellate, First District of Texas at Houston, sitting by assignment.

APPENDIX B

Court of Appeals

First Supreme Judicial District

ORDER

CARL A. MAAS, ET AL, APPELLANT

VS.

TEXAS AIR CORPORATION, APPELLEE

01-90-00189-CV

On this day came on to be considered Appellant's motion for rehearing. And such is hereby **OVERRULED.**

It is so ordered.

PER CURIAM

Panel consisting of Justice Stephen F. Preslar and Justice Frank C. Price.

Order entered April 25, 1991.

Kathryn Cox, Clerk of the Court

APPENDIX C

Court of Appeals
First Supreme Judicial District

ORDER

CARL A. MAAS, ET AL, APPELLANT

VS.

TEXAS AIR CORPORATION, APPELLEE

01-90-00189-CV

On this day came on to be considered Appellant's motion for en banc reconsideration. And such is hereby **DENIED.**

It is so ordered.

PER CURIAM

EN BANC

Order entered April 25, 1991.

Kathryn Cox, Clerk of the Court

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

CONTINENTAL AIRLINES, INC., ET AL., Debtors.	Case Nos. 90-932 through 90-984
CARL A. MAAS, ET AL., Movants, v. CONTINENTAL AIRLINES HOLDINGS, INC., Respondent.	M-92-118

STIPULATION AND ORDER

IT IS HEREBY STIPULATED between Carl A. Maas, et al. ("Movants") and Continental Airlines Holdings, Inc. ("Respondent") by and through their respective, undersigned counsel, as follows:

WHEREAS Movants are two hundred eighty current and former Continental Airlines pilots; and

WHEREAS Movants currently have an Application for Writ of Error pending in the Supreme Court of the State of Texas styled *Carl A. Maas, et al. v. Texas Air Corporation*, No. D-1168; and

WHEREAS Movants have filed in this Court a Motion for Order Granting Relief from Automatic Stay (M-92-118), requesting that the Automatic Stay of 11 U.S.C. § 362(a) ("stay") be modified in order to allow

Movants to pursue their Application for Writ of Error in the Texas Supreme Court; and

WHEREAS respondent has agreed to a modification of the Stay to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of the State of Texas as well as with proceedings in the appropriate Texas lower appellate court, in the event the Texas Supreme Court remands the case to such appellate court;

IT IS HEREBY AGREED this ___ day of ___, 1992, that the Automatic Stay under 11 U.S.C. Section 362(a) be modified to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of Texas so as to allow the Texas Supreme Court, or the appropriate lower appellate court, on remand, if applicable, to reach a determination as to the issues on appeal raised in the Application for Writ of Error in *Carl A. Maas, et al. v. Texas Air Corporation,* No. D-1168; and

IT IS FURTHER AGREED that Movants shall take no further action at the trial level in *Carl A. Maas, et al. v. Texas Air Corporation,* C.A. No. 85-53556 without first obtaining additional relief from the automatic stay from this Court.

JACOBS & CRUMPLAR, P.A.
/s/ Douglas B. Canfield
Douglas B. Canfield
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899
(302) 656-5445
Attorney for Movants
Date: ___

MORRIS, NICHOLS, ARSHT & TUNNELL
/s/ Luke W. Mette
Luke W. Mette
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorney for Respondent
Date: 6/5/92

SO ORDERED THIS 8th day of June, 1992.

/s/ Helen S. Balick
Helen S. Balick
United States Bankruptcy Judge

APPENDIX E

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 4, 1992

Mr. Tom F. Coleman
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Thomas Lee Bartlett
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Russell H. McMains
Law Offices of
Russell H. McMains, Jr.
P.O. Box 2846
2600 One Shoreline Plaza
Corpus Christi, TX 78403

Mr. Richard P. Keeton
Mr. Solace H. Kirkland
Mayor Day Caldwell
& Keeton, L.L.P.
700 Louisiana
Suite 1900
Houston, TX 77002

Mr. Tom W. Reavley
1301 West 25th Street
Suite 525
Austin, TX 78705

Mr. David L. Monroe
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Richard H. Anderson
2929 Allen Parkway,
Suite 1466
Houston, TX 77019

Mr. Gary C. Miller
Mayor, Day, Caldwell
& Keeton, L.L.P.
1900 NCNB Center
700 Louisiana
Houston, TX 77002

RE: Case No. D-1168
Style: CARL A. MAAS ET AL.
v. TEXAS AIR CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Tencha Damian
Tencha Damian, Deputy

APPENDIX F

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 9, 1992

Mr. Tom F. Coleman
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

Mr. Tom W. Reavley
1301 West 25th Street
Suite 525
Austin, TX 78705

Mr. Thomas Lee Bartlett
Coleman, Bartlett
& Associates
1001 Fannin, Suite 1313
Houston, TX 77002

RE: Case No. D-1168

Style: CARL A. MAAS ET AL.
v. TEXAS AIR CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK
BY: /s/ Tencha Damian
Tencha Damian, Deputy

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: Continental Airlines, Inc., et al.	:	Case No. 90-932-90-984
Debtors.	:	Jointly Administered Under Case No. 90-932
CARL A. MAAS, et al.,	:	
Movants,	:	MOTION NO: 92-118
v.	:	
CONTINENTAL AIRLINES HOLDINGS, INC.,	:	
Respondent.	:	

STIPULATION AND ORDER

IT IS HEREBY STIPULATED between Carl A. Maas, et al. ("Movants") and Continental Airlines Holdings, Inc., ("Respondent") by and through their respective counsel, as follows:

WHEREAS Movants previously had an Application for Writ of Error pending in the Supreme Court of the State of Texas, styled *Carl A. Maas, et al. v. Texas Air Corporation,* No. D-1168; and

WHEREAS Movants had filed in this Court a Motion for Order Granting Relief From Automatic Stay (M-92-118) requesting that the Automatic Stay of 11 U.S.C. § 362(a) ("Stay") be modified in order for Movants to pursue their Application for Writ of Error in the Texas Supreme Court; and

WHEREAS Respondent had agreed to a modification of the stay to allow Movants to proceed with their Application for Writ of Error in the Supreme Court of the State of Texas as well as with proceedings in the appropriate Texas lower appellate court, in the event the Texas Supreme Court remanded the case to such appellate court; and

WHEREAS the parties had entered into a Stipulation and Order setting forth the agreement reached by the parties, regarding the modification of the Stay, which Stipulation and Order was approved by The Honorable Helen S. Balick, United States Bankruptcy Judge on June 8, 1992; and

WHEREAS the Supreme Court of Texas has denied Movants' Application for Writ of Error, and on November 19, 1992, denied Movants' Motion for Rehearing on the Application for Writ of Error; and

WHEREAS Movants wish to file a Petition for a Writ of Certiorari to the Supreme Court of the United States, seeking review of the Order of Supreme Court of Texas denying Movants' Application for Writ of Error; and

WHEREAS Movants are prohibited from proceeding with filing their Petition for Writ of Certiorari due to the operation of the Automatic Stay of 11 U.S.C. § 362(a); and

WHEREAS Movants wish to have a further modification of the Automatic Stay, to allow them to proceed with filing a Petition for Writ of Certiorari to the Supreme Court of the United States; and

WHEREAS Respondent has agreed to a modification of the Stay to allow Movants to proceed with their Petition for Writ of Certiorari in the Supreme Court of the United States as well as with proceedings in the appropriate Texas appellate courts, in the event that the Supreme Court of the United States remands the case to such appellate courts;

IT IS HEREBY AGREED this ___ day of ___, 1993 that the Automatic Stay under 11 U.S.C. § 362(a) be modified to allow Movants to proceed with their Petition for a Writ of Certiorari in the Supreme Court of the United States, so as to allow the Supreme Court, or the appropriate lower appellate courts, on remand, if applicable, to reach a determination as to the issues on appeal raised in *Carl A. Maas, et al. v. Texas Air Corporation*, No. D-1168; and

IT IS FURTHER AGREED that Movants shall take no further action at the trial level in *Carl A. Maas, et al. v. Texas Air Corporation*, C.A. No. 85-53556 without first obtaining additional relief from the automatic stay from this Court.

JACOBS & CRUMPLAR, P.A.

By:
/s/ Douglas B. Canfield
Douglas B. Canfield
2 East 7th Street
P.O. Box 1271
Wilmington, DE 19899
(302) 656-5445
Attorney for Movants
Date: 3-25-93

MORRIS, NICHOLS, ARSHT & TUNNEL

By:
/s/ Luke W. Mette
Luke W. Mette
1201 N. Market St.
P.O. Box 1347
Wilmington, DE 19899
(302) 429-9200
Attorney for Respondent
Date: 3/25/93

SO ORDERED THIS 26th day of March, 1993.

/s/ Helen S. Balick
HELEN S. BALICK
United States
Bankruptcy Judge

APPENDIX H

Letter of
Agreement Between
Texas Air Corporation
and the
Air Line Pilots Association
International

WHEREAS, Texas Air Corporation (TAC) agrees to provide reassurances that it is aware of and will abide by the Agreements made by Continental Air Lines, Inc. (CAL) with the Air Line Pilots Association, International (ALPA) in connection with the Prosperity Plan and in connection with the corporate reorganization involving Continental, Texas International Airlines, Inc. (TI) and the proposed Continental Air Corporation (CAC).

Now, therefore, the parties hereby agree as follows:

1. TAC acknowledges that it is aware of the written Agreements, including the Fence Agreement, made by CAL with ALPA in connection with the Prosperity Plan with CAL, TI and ALPA in connection with the corporate reorganization involving CAL, TI, and CAC and will abide by such agreements.

2. TAC agrees that neither TAC nor any organization in which it or its successors or affiliates owns a controlling interest or exercise operational control will transfer aircraft operated by CAL, TI, or CAC, including leasing or interchange arrangements with or to a new or existing FAR Part 121 (other than CAL, TI or CAC) carrier with respect to which TAC or its successors or affiliates owns a controlling interest or exercises operational control.

3. TAC agrees that neither it nor any organization in which it or its successors or affiliates owns a controlling interest or exercises operational control shall conduct FAR Part 121 commercial flight operations unless such flying shall be performed by pilots on the CAL and TI System Seniority Lists (or a combined CAL-TI System Seniority List) in accordance with the terms and conditions of the CAL and TI Basic Agreements, as modified, or the Combined Agreement. This paragraph shall not apply to New York Air, Inc.

4. ALPA acknowledges that TAC has taken the position that TAC is not a carrier subject to the Railway Labor Act; TAC acknowledges ALPA's position to the contrary. This Agreement shall be without prejudice to the position of either party on this issue. In addition, this Agreement shall be without prejudice to the position of the parties with respect to ALPA's System Board Submission No. DAL-61-80 and Air Line Pilots Association, International v. Texas International Airlines, Inc., Civil Action No. H-81-2200 (U.S.D.C., N. D. Texas).

5. In the event a dispute arises concerning this Agreement, the Association may file a claim with TAC. TAC shall answer the claim in writing within 10 days following receipt of the claim. In the event the matter is not satisfactorily resolved, any controversy or claim arising out of or relating to this Agreement or the breach thereof, shall be settled by arbitration in accordance with the United States Arbitration Act, 9 U.S.C. Section 1, *et seq.*, by one arbitrator to be selected by the alternate striking method from a panel of three names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration

Association upon request of the Association within 30 days following receipt of TAC's response, or in the absence of a timely response by TAC within 60 days of the filing of this claim. Said arbitration shall be conducted in accordance with the rules, than obtaining, of said Association. The dispute shall be heard within 45 days following the submission of the dispute to the American Arbitration Association.

6. This Letter of Agreement shall run concurrently with the Duration section of the CAL Basic Agreement, as modified.

IN WITNESS WHEREOF, the parties have signed this Agreement this 18 day of Aug, 1982.

TEXAS AIR CORPORATION

BY /s/ Francisco A. Lorenzo
Francisco A. Lorenzo,
President

AIR LINE PILOTS ASSOCIATION INTERNATIONAL

BY: /s/ J. J. O'Donnell
J. J. O'Donnell,
President

Witness:

/s/ L. A. Baxter
L. A. Baxter, Chairman
Continental Airlines MEC

Witness:

/s/ Gary L. Casey

Witness:

/s/ Louis J. Colombo

Witness:

/s/ Illegible

Witness:

/s/ Illegible

Witness:

/s/ J. McCarthney
J. McCarthney

Witness:

/s/ _____
T. Mourning

Witness:

/s/ _____
N. Miller

Witness:

/s/ R. Waters
R. Waters, Chairman
Texas International Airlines MEC

Supreme Court, U.S.
FILED
MAY 24 1993
OFFICE OF THE CLERK

No. 92-1702

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

CARL A. MAAS, ET AL.
Petitioners,

v.

TEXAS AIR CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BARRY P. SIMON
SENIOR VICE PRESIDENT
AND GENERAL COUNSEL

DANIEL P. CASEY
ASSOCIATE GENERAL COUNSEL
CONTINENTAL AIRLINES, INC.
2929 ALLEN PARKWAY
HOUSTON, TEXAS 77019
(713) 834-5131

CHARLES A. SHANOR*
JON A. GEIER
PAUL, HASTINGS, JANOFSKY & WALKER
1050 CONNECTICUT AVE., N.W.
SUITE 1200
WASHINGTON, D.C. 20036
(202) 223-9000

ATTORNEYS FOR RESPONDENT

**COUNSEL OF RECORD*

MAY 24, 1993

QUESTION PRESENTED

Whether the Texas state courts erred in their interpretation of state contract law when they dismissed Petitioners' breach of contract action, where Petitioners sought to bypass an exclusive arbitration clause and enforce an agreement which had not only expired, but to which Petitioners were not even parties?

LIST OF PARTIES

Petitioners and appellants in the Texas Court of Appeals are a group of 280 present and former pilots of Continental Airlines, Inc. ("Continental"). Two hundred and sixty-five of the 280 listed Petitioners have settled the claims at issue here.

Respondent below was Texas Air Corporation (also known as Continental Airlines Holdings, Inc.), at the time the corporate parent of Continental. On April 27, 1993, pursuant to a plan of reorganization confirmed by the Delaware Bankruptcy Court, *In re Continental Airlines, Inc.*, Case Nos. 90-932 through 90-984 (Bankr. D. Del.), Continental was restructured and is the successor in interest by merger to Continental Airlines Holdings, Inc.

RULE 29.1 STATEMENT

Continental Airlines, Inc. is the a 91% owner of Continental Micronesia, Inc. It has no parent or other non-wholly owned subsidiaries.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

No. 92-1702

CARL A. MAAS, ET AL.,

Petitioners

v.

TEXAS AIR CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion by the Court of Appeals for the First District of Texas.

OPINIONS BELOW

The opinion of the Court of Appeals for the First District of Texas is unpublished (Pet. App. A). The Orders denying rehearing and rehearing en banc are both unpublished (Pet. Apps. B and C), as are the Order denying application for a writ of error to the Texas Supreme Court and the Order denying a motion for rehearing of that application for writ of error (Pet. Apps. E and F).

JURISDICTION

The automatic stay created when Respondent filed bankruptcy on December 3, 1990 was lifted on March 26, 1993 (Pet. App. G) permitting this petition for certiorari to go forward. Thereafter the petition was timely filed under 11 U.S.C. § 108(c)(2). However, Petitioner improperly invokes jurisdiction under 28 U.S.C. § 1257. The decision below does not call in question any of the grounds for issuing a writ of certiorari under that section. Moreover, pursuant to Section 1257 a writ of certiorari can only be had to "final judgements or decrees rendered by the highest court of a state." Here, the petition for certiorari is defective on its face. Although Petitioners sought but were denied review by the Texas Supreme Court, the Petition seeks a writ of certiorari to the Court of Appeals for the First District of Texas, which is not the highest Texas state court.

STATEMENT OF THE CASE

In 1982, Continental and the Air Line Pilots Association, International ("ALPA), the union then representing Continental's pilots, entered into a series of agreements, including amendments to their collective bargaining agreement and various other agreements dealing with the operational merger between Continental and another airline. At the same time, Respondent and ALPA entered in to an agreement referred to as the "Side Letter," the

provisions of which specifically pertained to Respondent's right to form additional airline subsidiaries. The Side Letter expressly provided that it would "run concurrently with the Duration section of the [Continental] Basic Agreement," and that any dispute as to its terms "must be brought by arbitration." Pet. App. H.

In September 1983, Continental filed for Chapter 11 reorganization, 11 U.S.C. § 1101, and moved to reject the pilots' collective bargaining agreement pursuant to 11 U.S.C. § 365. That motion was ultimately granted and the pilot labor contract was deemed rejected as of the day prior to Continental's bankruptcy filing. *In re Continental Airlines Corp.*, 901 F.2d 1259, 1264 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992).

After ALPA filed a demand for arbitration under the Side Letter, in January 1984, Respondent filed suit for a declaratory judgment that the Side Letter had expired pursuant to its duration clause. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. 84-530 (S.D. Tex.). Prior to a final resolution of that case, however, Continental and ALPA reached a global settlement of claims and litigation. As to Respondent's Side Letter litigation the settlement provided that it would be "dismissed with prejudice," with the additional notation, "ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the [ ] Side Letter." Res. App. at 3a.

Despite their union's settlement, a group of pilots, on behalf of a purported class which would have included Petitioners, sought to intervene as "third party beneficiaries" of the Side Letter litigation and to force an arbitration in their own name. Respondent resisted and the District Court denied intervention. In an unpublished opinion, that decision was upheld by the Court of Appeals for the Fifth Circuit. *O'Neill v. Texas Air Corp.*, No. 89-2455, (5th Cir. April 13, 1990). *See* Res. App. The Court held that "[t]he Side Letter is a

contract between [Respondent] and ALPA. The pilots were not parties to the Side Letter and were not granted any right to enforce its terms. Indeed, the Side Letter gives ALPA the exclusive authority to enforce its terms and to settle disputes arising under the Side Letter." Res. App. at 4a.

Immediately prior to the settlement between Continental and ALPA, Petitioners filed their complaint in Texas state court. Respondent subsequently filed a motion for summary judgment on a variety of grounds, including (1) that as a matter of contract interpretation (a) the Side Letter only provided enforcement through arbitration and (b) the Side Letter had been extinguished with the rejection of Continental's Basic Agreement, (2) Petitioners were not third-party beneficiaries under the Side Letter, and (3) ALPA had settled all claims under the Side Letter. Respondent's motion was granted. On appeal, the Court of Appeals for the First District of Texas affirmed, holding as a matter of contract interpretation under state law that the Side Letter had expired by its terms and, in any event, arbitration was the only available forum for enforcement. The Texas Supreme Court refused to review the Court of Appeals decision, and this petition followed.

ARGUMENTS IN OPPOSITION TO CERTIORARI

This case, which involves a fact-based issue of contract interpretation under Texas state law, is wholly inappropriate for consideration by this Court. This case involves no conflict between the decision of the Court of Appeals for the First District of Texas and the decision of any other court, federal or state.[1] There is no question in this

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1 A writ of certiorari is also inappropriate because there is no jurisdiction under 28 U.S.C. § 1257. *See supra* at 2.

case of significance to anyone other than the few remaining parties.[2]

No more than a summary response to the reasons asserted by Petitioners for granting the writ is merited. Contrary to Petitioner's assertions at pp. 6-7, which are wholly unsupported by citation to relevant authority, there is no issue of national labor policy involved in this case. Indeed, Respondent is unable even to ascertain the nature of the conflict suggested by Petitioners. They appear to suggest, however, that this case raises issues relating to a conflict between labor and bankruptcy law arising from the rejection of a collective bargaining agreement. It clearly does not. Moreover, this Court has already denied a writ of certiorari filed by some of these same Petitioners in a related case arising out of the same set of facts which directly implicated that precise issue. *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), *cert. denied*, 113 S. Ct. 87 (1992).[3] It is unthinkable that this Court would now permit through the "back door" this previously rejected claim.

The second reason proffered in support of the writ, that the decision below "is contrary to 11 U.S.C. § 365(a),"

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2 Contrary to the assertion of the Petition, only fifteen Petitioners retain any interest in these proceedings. The other two hundred sixty-five named Petitioners have executed waivers releasing their claims.

3 Petitioner in *In re Continental* was the O'Neill Group, a group of approximately 450 current and former Continental pilots. Most of the 280 current Petitioners were also members of the O'Neill Group. That case involved the proper calculation of contract rejection damages where the Petitioners had gone on strike. Consistent with federal labor law, the Fifth Circuit held, *inter alia*, that employees are not entitled to contract rejection damages for periods of time spent on strike. 901 F.2d at 1265-66. The O'Neill Group argued in its petition for certiorari that such a result created a conflict between federal labor law and bankruptcy law worthy of review. This Court denied the O'Neill Group's petition.

Petition at 7-8, is equally devoid of merit. The agreement upon which Petitioners seek to rely says on its face that it "shall run concurrently with the duration section of the [Continental] Basic Agreement, as modified." That Basic Agreement was rejected in a bankruptcy decision *not under review in this case*. The Texas court merely applied state law principles of contract interpretation based upon that decision. No Section 365(a) issue exists because Section 365(a) was never mentioned by the court below.

Petitioners' also contend that a writ is justified because the Texas court's decision is "plainly wrong," and can not serve as an "adequate state ground" for that decision. Petition at 9-10. Unlike the first two reasons, which purport to have federal law components, this more candid request asks that this Court reverse a decision on state law made by a state court. This Court's jurisdiction is not properly invoked simply to correct perceived erroneous state law interpretations, even when they are claimed to be "plainly wrong." *Cf. Gryger v. Burke*, 334 U.S. 728, 731 (1948) (if mere error was a denial of due process, then "every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.").

Finally, Petitioners seek to rebut other arguments Respondent raised below, but which they concede were not relied upon by the Texas court. Petition at 10-14. None of these merits-oriented arguments need detain this Court, for all concern matters of state law or minute fact issues (like the date upon which Petitioners filed their state law complaint), which are simply inappropriate for this Court's review.[4]

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4 Petitioner's reason IV.A concerns whether they were "third party beneficiaries" under state law; reason IV.B concerns whether Petitioners, as a matter of fact, waived their claims; reason IV.C concerns admittedly "state law contract claims" and the "defense of failure to mitigate damages."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Barry P. Simon
Senior Vice President
and General Counsel

Daniel P. Casey
Associate General Counsel
Continental Airlines, Inc.
2929 Allen Parkway
Houston, Texas 77019
(713) 834-5131

Charles A. Shanor*
Jon A. Geier
Paul, Hastings, Janofsky
& Walker
1050 Connecticut Ave., N.W.
Suite 1200
Washington, D.C. 20036
(202) 223-9000

Attorneys for Respondent

May 24, 1993

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2455

TEXAS AIR CORPORATION,

Plaintiff-Appellee,

and

CONTINENTAL AIR LINES, INC.,

Party In Interest-Appellee,

v.

AIR LINE PILOTS ASSOCIATION,

Defendant,

v.

JOSEPH E. O'NEILL, PHILLIP M. ORDWAY, JAMES LOWRY, and JACK PENDLETON, Etc.,

Intervenors-Appellants,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS
(CA H 84 530)
(April 13, 1990)

Before BROWN, JOLLY, AND DAVIS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

On August 18, 1982, Texas Air Corporation ("TAC"), the parent of Continental Air Lines ("Continental"), and the Air Line Pilots Association ("ALPA") executed a Letter of Agreement ("the Side Letter") in which TAC agreed "to provide reassurances that it is aware of and will abide by" the contemporaneously executed "Prosperity Plan" collective bargaining agreements between Continental and ALPA. Continental filed a Chapter 11 bankruptcy petition on September 24, 1983. On October 1, 1983, ALPA commenced a strike against Continental.

On January 31, 1984, TAC commenced this action seeking a declaratory judgment that the arbitration provision in the Side Letter could not be enforced because of Continental's bankruptcy. On January 23, 1985, the district court ruled that the dispute was covered by the Side Letter's arbitration clause, and it granted ALPA's motion to compel arbitration. TAC filed a timely motion to alter or amend the district court's order.

Following intensive settlement negotiations, on October 30, 1985, Continental and ALPA agreed to resolve ALPA's strike and to settle related litigation and bankruptcy claims. After resolving most of the issues through negotiations, Continental and ALPA agreed to submit the remaining issues to Bankruptcy Judge Roberts, whom the parties designated by agreement to act as an interest

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

arbitrator, in order to finalize the settlement. On October 31, 1985, Judge Roberts entered an Order and Award setting forth the terms of the settlement. The Order and Award ended ALPA's strike against Continental and contained back-to-work provisions. The Order and Award also required Continental and ALPA to dismiss strike-related litigation. An attachment to the Order and Award included the instant case as number five in a list of eighteen pending litigation matters to be "dismissed with prejudice," with the additional notation, "ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the TAC-ALPA Side Letter." The instant suit, however, remained pending despite the language of the Order and Award.

On February 18, 1986, while the TAC motion to alter or amend the district court's order compelling arbitration was still pending, the pilot-appellants in this case ("the O'Neill Group") moved as a class to intervene as of right in ALPA's claim against TAC pursuant to Fed.R.Civ.P. 24(a). The O'Neill Group pilots sought an order requiring TAC to arbitrate with them in ALPA's stead.

On July 28, 1987, the district court granted the pilots' motions to intervene and denied TAC's motion to alter or amend the order compelling arbitration.

On August 3, 1987, TAC filed a motion to vacate the order compelling arbitration. The O'Neill Group filed a cross-motion to enforce the order compelling arbitration. Although no motion to vacate the intervention order was pending before it, the district court vacated its previous order granting the pilots intervention of right, vacated the order compelling arbitration, and denied the O'Neill Group's motion to enforce the order compelling arbitration. The district court held that the pilots were not entitled to intervene because individual pilots did not have rights to enforce the Side Letter and because the pilots were bound by ALPA's agreement to dismiss this case and "waive all claims arising under the

TAC-ALPA Side Letter" in exchange for the benefits of the settlement for the striking pilots as a group. The O'Neill Group filed a timely notice of appeal.

An applicant is entitled to intervene as of right under Fed.R.Civ.P. 24(a) "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Review of a decision to deny a motion to intervene under Fed.R.Civ.P. 24(a) based on the applicant's interest in the subject matter presents a question of law subject to de novo review. *Mothersill D.I.S.C. Corp. v. Petroleos Mexicanos, S.A.*, 831 F.2d 59 (5th Cir. 1987).

We conclude that the district court correctly denied the O'Neill Group's motion to intervene, and we affirm the judgment of the district court for the following reasons:

1. The Side Letter is a contract between TAC and ALPA. The pilots were not parties to the Side Letter and were not granted any right to enforce its terms. Indeed, the Side Letter gives ALPA the exclusive authority to enforce its terms and to settle disputes arising under the Side Letter. "Where only the parties to the labor agreement are given the power to invoke the grievance machinery, an individual may not sue to compel arbitration." *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F.2d 167, 170-71 n.4 (5th Cir. 1971). The O'Neill Group's reliance on cases that characterize employees as third party beneficiaries of collective bargaining agreements is misplaced for two reasons: (1) the Side Letter is not a collective bargaining agreement; and (2) alternatively, none of those cases supports the proposition that an employee has standing to sue under a labor contract where the contract vests exclusive authority in the union to seek arbitration or

where the union subsequently agrees to waive and settle all disputes under the contract.

2. In the Order and Award, ALPA expressly and unambiguously agreed to waive "all claims" arising under the Side Letter. The pilots argue, however, that the strike settlement preserved their individual claims because the settlement covered only those claims that ALPA had against Continental and TAC. We disagree. As of October 31, 1985, the date of the Order and Award, the O'Neill Group had not asserted or threatened any claims under the Side Letter and had not applied for leave to intervene in the lawsuit between TAC and ALPA with respect to the Side Letter. Nothing in the settlement or in the bankruptcy court and district court orders relating to the settlement preserves any individual claims by members of the O'Neill Group with respect to the Side Letter.

3. The pilots argue that ALPA had no authority to enter into a strike settlement that would extinguish their individual claims. We hold that ALPA had authority to bind the pilots to the settlement because the Side Letter itself gave ALPA exclusive authority to settle disputes arising thereunder and, alternatively, because the Side Letter dispute arose out of a classic "major" dispute. Furthermore, even if there were some doubt as to ALPA's legal authority, the pilots are estopped to deny that authority by their repeated acknowledgment of ALPA's status as their representative and by their failure to communicate the existence of limitations on that authority or otherwise to repudiate ALPA's authority prior to ALPA's agreement to settle on their behalf.

"Major disputes" under the Railway Labor Act relate primarily to the formation of collective bargaining agreements; "minor disputes" involve the interpretation of collective bargaining agreements and the resolution of lesser disputes related to the employment relationship. *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 U.S. 711 (1945) (*Burley I*),

aff'd on rehearing, 327 U.S. 661 (1946) (*Burley II*). Contracts that do not directly establish rates of pay may nonetheless deal with working conditions and be subject to federal labor laws. *See Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 26 (1962); *Morales v. Southern Pacific Transp. Co.*, 894 F.2d 743 (5th Cir. 1990) ("[s]tate law claims which grow out of the employment relationship can constitute 'minor disputes' under the Act, even when the claims do not arise directly from the collective bargaining agreement itself"). The collective bargaining representative has the exclusive right to bargain for and bind all employees in its jurisdiction where a "major dispute" is concerned. *Burley I*. With respect to a "minor dispute," however, settlement by the union "in the absence of legally sufficient authorization will not bar a suit by the individual employee to enforce his claim." *Broniman v. Great Atlantic & Pacific Tea Co.*, 353 F.2d 559, 562 (6th Cir. 1965), *cert. denied*, 384 U.S. 907 (1966).

The pilots contend that, "by analogy to" the Railway Labor Act, their claims under the Side Letter constitute a "minor dispute" because those claims involve the interpretation and enforcement of an existing agreement, the Side Letter, which by its own terms is not a collective bargaining agreement and has nothing to do with bargaining for the future. The pilots therefore contend that ALPA's settlement is not binding on them because ALPA did not have express or implied authority to settle the pilots' claims against TAC. We disagree. The O'Neill Group's claim under the Side Letter arose out of Continental's rejection of its collective bargaining agreement with ALPA, which triggered ALPA's subsequent strike. The strike settlement that ended the strike and contained detailed back-to-work provisions clearly resolved a "major" dispute. In negotiating that settlement, ALPA had the authority to settle all claims arising out of that dispute, including claims, such as those under the Side Letter, that might in other circumstances be deemed "minor" disputes. *National Airlines, Inc. v. I.A.M.*,

478 F.2d 1062 (5th Cir. 1973); *United Indus. Workers v. Board of Trustees of Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968), *cert. denied*, 395 U.S. 905 (1969).

TAC's motion to dismiss this appeal on the grounds of res judicata and mootness is denied. We also reject both parties' arguments regarding collateral estoppel, because we conclude that application of the doctrine of collateral estoppel is inappropriate in this case.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

No. 92-1702

In The

Supreme Court of the United States

October Term, 1992

CARL A. MAAS, ET AL.,

Petitioners,

vs.

TEXAS AIR CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals For The First District Of Texas

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

THOMAS W. REAVLEY
Counsel of Record

1301 West 25th Street
Suite 535
Austin, Texas 78705
(512) 476-2464

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners direct this Reply to three points raised by Respondent in its Brief in Opposition to Petition for Writ of Certiorari: (1) Whether this Court has jurisdiction under 28 U.S.C. § 1257; (2) whether the issues raised in *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), cert. denied, 113 S.Ct. 87 (1992), are distinct from the issue which petitioners seek to raise in this case; and (3) whether the petition is properly directed to the decision of the intermediate state appellate court.

I.

THIS COURT HAS JURISDICTION TO GRANT CERTIORARI

Respondent disputes this Court's jurisdiction to grant certiorari in this case under 12 U.S.C. § 1257. That section confers certiorari jurisdiction "where any right, title, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or any commission held or authority exercised under, the United States." Respondent claimed in the Texas Court of Appeals that Continental's rejection of the Basic Agreement pursuant to 11 U.S.C. § 365(a) terminated and canceled that labor agreement, and the Court of Appeals so held. Therefore, respondent set up or claimed a right under § 365(a), and the state court's interpretation of the effect of contract rejection under § 365(a) is reviewable by this Court.

Respondent further argues that petitioners are asking this Court to review the § 365(a) contract rejection decision made in the Continental bankruptcy. Petitioners have not complained of that decision in their petition. Petitioners do seek review of the state court's erroneous interpretation of the effect of that § 365(a) rejection on the TAC Side Letter. The Texas Court of Appeals' decision was not based on "state law principles of contract interpretation," as respondent argues (Resp. Br. at 6), but rather on a fundamentally erroneous interpretation of 11 U.S.C. § 365(a).

Finally, respondent asserts that § 365(a) is not before this Court because "Section 365(a) was never mentioned

by the court below." Resp. Br. at 6. The state court explicitly based its decision on the effect of the federal bankruptcy court's order approving contract rejection. Respondents have not suggested any legal basis other than § 365(a) for contract rejection in bankruptcy proceedings. Surely the fact that the state court chooses not to cite the section number of the federal statute it is interpreting cannot shield its decision from review by this Court.

II.

THIS COURT HAS NOT PREVIOUSLY CONSIDERED PETITIONERS' CLAIMS

Respondent suggests that this Court previously denied certiorari in a case raising the same issues and arising out of the same facts: *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), *cert. denied*, 113 S.Ct. 87 (1992). Resp. Br. at 5. That case involved the calculation of the damages arising out of Continental's rejection of the underlying collective bargaining agreement. The present case does not present that issue at all. Petitioners brought this suit against TAC on the Side Letter; petitioners assert no claim in this suit against Continental on the collective bargaining agreement.

The issue here is the viability of respondent's § 365(a) defense to petitioners' Side Letter contract claim. The significance of this issue is enhanced by the fact that the TAC Side Letter was intended to provide employees with protection beyond a collective bargaining agreement with a subsidiary corporation employer. The pilots expected (and petitioners submit, had every right to expect) that

the Side Letter contract with respondent TAC, the parent corporation, would survive any § 365(a) rejection of the Basic Agreement by Continental. Therefore, the state court decision misinterpreting § 365(a) does seriously weaken employees' ability to protect themselves from an employer's use of the bankruptcy statutes to shed labor contracts it no longer desires to honor. These considerations justify review by this Court.

III.

PETITIONERS HAVE PROPERLY SOUGHT REVIEW OF THE DECISION OF THE TEXAS COURT OF APPEALS

Respondent argues that the petition for certiorari is defective because it "seeks certiorari to the Court of Appeals for the First District of Texas, which is not the highest Texas state court." Resp. Br. 2. However, this Court has held in at least two cases that its review is properly directed to the intermediate Texas appellate court when the Texas Supreme Court denies discretionary review of a Texas Court of Appeals' decision. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678, n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954). Review by the Texas Supreme Court was discretionary in this case, and its refusal to accept the case with the notation "writ denied" is not a decision on the merits. Texas Rules of Appellate Procedure, Rule 133(a); V.T.C.A. Government Code § 22.001(a)(6).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS W. REAVLEY
Counsel of Record

1301 West 25th Street
Suite 535
Austin, Texas 78705
(512) 476-2464

Counsel for Petitioners